IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 06/02/2004

Coram

The Hon'ble Mr. Justice P. SATHASIVAM
and
The Hon'ble Mr. Justice S.R. SINGHARAVELU

C.M.A. No. 12 of 1996

1. Amalorpava Mary

2. A. Arputha Josephine .. Appellants/Petitioners.

-Vs-

1. Kulandai Ammal,
2. M. Arulnathan,
3. Santhana Mary,
4. Durai .. Respondents/Respondents.

Appeal against the decree and judgment of the I Additional District Judge, Tiruchirapalli, made in O.P.No. 278 of 1987 dated 22-9-1995.

!For Appellants : Mr. M.V.Krishnan

^For Respondents : No appearance

:JUDGEMENT

(Judgement of the Court was made by P. Sathasivam, J.,)

Aggrieved by the order of the learned I Additional District Judge, Tiruchirapalli dated 22-9-95, made in O.P.No. 278 of 87 , dismissing the said petition filed for grant of Letter of Administration with Will in respect of the Estate of Innasi Ammal, the appellants have filed the above appeal before this Court under Section 384 of Indian Succession Act, 1925.

2. For convenience we may refer the parties as described in O.P.No. 278 of 87. In the matter of grant of Letter of Administration with Will annexed to the Estate of Innasi Ammal, Amalorpava Mary and Arputha Josephine/petitioners filed O.P.No. 278 of 87 before the District Court, Tiruchirapalli under Section 287 of the Indian Succession Act. In the petition it is stated that Innasi Ammal and Innasi Muthu are the parents of the first respondent and I.A. Pichai Asari and Madhalai Mary. Madhalai Mary is no more and her children are the respondents 2 to 4. I.A. Pichai Asari @ Arokiasamy died on 8-7 -83. The

first petitioner is his widow and the second petitioner is his only daughter. The said Innasi Ammal died on 2-12-73. While in sound disposing state of mind, she executed a Will on 29-1-69. The said Will was duly executed, got attested and registered as per law. In the said Will, Innasi Ammal admitted that the petition mentioned site was purchased by her on 18-1-42. In the said Will of Innasi Ammal, her son Pichai Asari @ Arokiasamy has been given exclusive right over the petition mentioned property. She further stated that her daughters have nothing to do with the property dealt with her under the Will. Innasi Ammal died on 2-12-73 and on her death, the property described in the last Will of Innasi Ammal has come into operation. The property is also in possession of the petitioners. Since the parties are Christians and there is a registered will, the only remedy is to get letters of administration with the will annexed; hence the petitioners filed the above petition.

3. The first respondent Kulandhai Ammal alone filed a counter statement before the Court below disputing various averments made in the petition. It is stated that she came to know the will only when the petitioners filed a written statement in her suit for partition in O.S.1179/84 on the file of the Subordinate Judge, Tiruchirapalli. The alleged will is suspicious and not true. When the son in a position to dominate her will, the will cannot be said to be true or that it had been executed by Innasi Ammal freely or in her own mind. The petitioners are not entitled to the letters of administration and prayed for dismissal of the petition.

4. Before the District Court, Chinnayan, one of the attestors of the will was examined as P.W.1 and second petitioner A. Arputha Josephine as P.W.2, besides marking the will dated 29-1-69 as Ex.P-1; certified copy of the will as Ex. P-2. No oral and documentary evidence was let in on the side of the respondents. The learned District Judge, after holding that the will dated 29-1-69 is a document under Section 63 of the Indian Succession Act, 1925, in the absence of examination of two attesting witnesses, examination of one attesting witness as P.W.1 is not sufficient compliance of the said provision, dismissed the petition filed by the petitioners. Questioning the said order, the petitioners have filed the present appeal.

5. Heard Mr. M.V. Krishnan, learned counsel for the appellants and none appeared for the respondents.

6. The only point for consideration in this appeal is, whether the petitioners have proved the due execution of the will dated 29-1-69 and entitled Letters of Administration?

7. We have already referred to the right and entitlement of the petitioners with reference to the property, as described in the Will. It is the specific claim of the petitioners that Innasi Ammal while in a sound disposing state of mind, executed her last will on 29-1-69. She died on 2-12-73. It is also the claim of the petitioners that under the said will of Innasi Ammal, her son Pichai Asari @ Arokiasamy has got exclusive right over the property described therein. It is also stated that their daughters have nothing to do with the

property. Though the first respondent filed a counter statement disputing various averments, the records show that they did not participate in the proceedings and no material by way of oral and documentary evidence was let in on their side. It is seen that except the original and certified copy of the will, the evidence of A. Arputha Josephine, 2nd petitioner and Chinnaian, one of the attestors of the will, no other evidence was placed before the Court below. The learned District Judge relying on Section 63 of the Indian Succession Act, 1925 and taking note of the fact that the will shall be attested by 2 or more witnesses, in the absence of examination of two attesting witnesses, arrived at a conclusion that the will-Ex.P-1 has not been proved in the manner prescribed and dismissed the petition filed by the petitioners for letters of administration. Mr. M.V. Krishnan, learned counsel appearing for the petitioners (appellants) would contend that though Section 63 of the Indian Succession Act, 1925 (hereinafter referred to as "the Act") compels that the will has to be attested by two or more witnesses, examination of one of the attestors is sufficient and in view of the evidence of P.W.1, one of the attestors, the petitioners have proved the due execution of the will and the Court below has committed an error in dismissing their petition. In support of his claim, he also relies on a decision of this Court in Andal Ammal, In re, reported in 1968 I MLJ 356.

8. There is no dispute that the parties in this appeal are Christians, and the provisions of Indian Succession Act, 1925 alone are applicable. More over, rightly an application for grant of Letters of Administration was filed under Section 278 of the Act. Now let us consider Section 63 which deals with execution of unprivileged wills.

"Section 63. Execution of unprivileged Wills.- Every testator, not being a soldier employed in an expedition or engaged in actual warfare or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:-

(a) xx xx
(b) xx xx
(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has been some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

In our case, it is seen from Ex. P-1, the execution was attested by 1 :- I. Chinnaian, teacher, Keel Padayachi street, Trichy-1; and 2:- V. Maria Soosai, son of Ponnusamy Asariar, No.17, Kanimiyan Mettu street. Palakkarai, Trichy. It is further seen that in addition to the above mentioned two attestors, the will was written by A. Dhanasami Pillai, Bajanai Kooda Street, Palakarai, Trichy District. Ex.P-1 has been registered before the competent authority. The will-Ex.P-1 shows that the above referred two persons have attested the due execution. Among the two, one of the attestors, namely, Chinnaian alone

was examined as P.W.1. The learned District Judge, in the light of subsection (c) of Section 63 of the Act, was of the opinion that the will has to be attested by 2 witnesses. He also observed that in view of the fact that one of the attestors (P.W.1) alone was examined, arrived at the conclusion that the same is not in compliance with the provision and found that the execution has not been duly proved. We are unable to accept the said conclusion. No doubt, the said provision insists that the will is to be attested by 2 or more witnesses, each of whom has to be seen the attestors signing and affixing their mark to the will in the presence of and by the direction of the testators and each of the witnesses shall sign the will in the presence of the testators. It is also clear from the provision that it shall not be necessary that more than one witness be present at the same time and no particular form of attestation is required. In this regard, it is relevant to refer the decision of T. Ramaprasada Rao, J., in the case of Andal Ammal, In re, reported in 1968-I MLJ 356. While considering an application filed under Section 232 of the Indian Succession Act, 192 5, the learned Judge held that examination of one of the attestors is sufficient if he states that the other attesting witness also was present and he attested the same in the presence of the testator. In the case before the learned judge, the will was executed on 16-2-1955 . The testator lived for 7 long years thereafter and died on 19-1-62 . Only one attestors was examined and in his evidence he explained that the other attesting witnesses also was present and he attested the same in the presence of the testators of the will. The learned Judge has held that the evidence of one of the attestors that the other attesting witness also was present and he attested the same in the presence of testator will satisfy the requirement and therefore, it has to be held that the will has been duly executed and signed by the deceased and it is the last will of the free and capable testator. When even a will is sought to be proved, onus lies upon the party propounding a will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. In our case, we perused the evidence of P.W.1. His evidence is in the following manner:

@,e;j capypy; cs;s rhl;rpfspy; ifbaGj;Jf;fspy; Kjy; ifbaGj;J vd;Dila ifbaGj;J/ capiy vGjp itj;j ,d;dhrp mk;khs; capypy; jd; ifnuifia itj;jpUf;fpwhu;/ mtu; ifnuif itf;Fk;nghJ ehd; ghu;j;njd;/ capy; vGjpa rhl;rpa[k; kw;Wk; xU rhl;rpa[k; ,d;dhrp mk;khs; capypy; ifnuif itj;jnghJ ghu;j;Jf;bfhz;oUe;jhu;/ kw;w rhl;rpfs; ifbaGj;J nghl;lij ehd; ghu;j;njd;/ ,d;dhrp mk;khs; ,e;j capy; vGjpa fhyj;jpy; epidt[k; "hgf rf;jpa[k; ey;y epiyapnyna ,Ue;jJ/ gj;jpug; gjpt[mYtyfj;jpy; nkw;go capiy gjpt[bra;jnghJ capiy vGjp itj;jJ ,d;dhu; vd;W epUgpj;j rhl;rpahf ehd; ,Ue;jpUf;fpnwd;/ me;j capy; jhd; m /rh/M/1 MFk;/ @
(Emphasis supplied)
In the above evidence, P.W.1 clearly explained and admitted the execution of the Will of Innasi Ammal by putting her left hand thumb impression in the presence of witnesses, including himself (P.W.1). He also deposed that the said Innasi Ammal had put her signature. His evidence also shows that the attesting witness also was present and he attested the same in the presence of the testator. The perusal of the evidence of P.W.1 clearly proves the due execution of the will-Ex.P-1. We are satisfied that the evidence of one of the attesting witnesses that the other witness was present and attested the same in the presence of the testators will be sufficient. We are unable to

accept the reasoning of the learned District Judge in dismissing the petition merely on the ground that the other attesting witness was not examined. As discussed above, in the light of the evidence of P.W.1, we hold that the petitioners have proved the due execution of the willEx.P-1 and entitled Letters of Administration in respect of the estate of the deceased Innasi Ammal with the Will dated 29-1-69. Civil Misc., Appeal is allowed. No costs.

R.B.

Index:- Yes
Internet:- Yes.

To:-

1. I Addl. District Judge, Tiruchirapalli with records.
2. The Reocord Keeper, VR Section, High Court, Madras.